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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j) of the)	MM Docket No. 97-234
Communications Act – Competitive Bidding)	
For Commercial Broadcast and Instructional)	
Television Fixed Service Licenses)	
)	
Reexamination of the Policy Statement)	GC Docket No. 92-52
On Comparative Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to Expedite)	
The Resolution of Cases)	
)	
To: The Commission		

MOTION FOR STAY

Barbara D. Marmet ("Marmet") and Frederick Broadcasting LLC, which is the licensee of WAFY (FM), Middletown, Maryland and which is owned and controlled by Marmet, hereby moves for a stay of the First Report and Order in this proceeding, *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licensees*, FCC 98-194, 63 *Fed. Reg.* 48615 (1998) (hereafter *Bidding Order*), as it pertains to the Middletown, Maryland, proceeding (MM Docket Nos. 83-985 and 83-987). Separately, Marmet has petitioned for reconsideration of the *Bidding Order*. In support, Marmet shows as follows:

Legal Standard

The four-part showing to be made in a motion for stay is as follows:

1. that petitioner is likely to prevail on the merits;
2. that petitioner will suffer irreparable harm if a stay is not granted;
3. that other interested parties will not be harmed if the stay is granted, and
4. that the public interest favors grant of the stay.

The FCC need not find that the likelihood of success on the merits is a mathematical probability, if the other three factors strongly favor granting the motion. Furthermore, an order maintaining the *status quo* would be appropriate when a serious legal question is presented, if little harm will befall others if the stay is granted and denial of the stay would inflict serious harm. *Virginia Petroleum Jobbers Association v. FCC*, 259 F.2d 921, 925 (DC Cir 1958), *modified in Washington Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 843 (DC Cir 1977).

Chronology and Background

- On March 10, 1982 Jerome Thomas Lamprecht ("Lamprecht") entered into an Agreement of Sale and Purchase with Mr. and Mrs. James R. Remsburg for the purchase of approximately three acres of land for the price of \$35,000 ("Agreement"). That Agreement provided that the Settlement would be held on or before October 1, 1982. An Addendum to the Agreement also dated March 10, 1982 provided that if the FCC and the Frederick County Planning and Zoning Commission did not give their approvals, then the contract would be null and void and the deposit returned in full.
- On April 9, 1982 Lamprecht tendered for filing his application for a construction permit for a new FM broadcast station on Channel 276A at Middletown, Maryland.
- On September 8, 1982 Marmet tendered for filing her application for a construction permit for a new FM broadcast station on Channel 276A at Middletown, Maryland.
- On October 2, 1982 Lamprecht lost basic qualifications and began a cover-up of the site defect. Lamprecht no longer had a reasonable expectancy that his proposed site would be available to him, a fact that Lamprecht concealed until September 19, 1990.

- On September 1, 1983 Marmet's and Lamprecht's applications were designated for hearing.
- On June 8, 1984 Administrative Law Judge Walter C. Miller issued his Initial Decision, granted Marmet's application and denied Lamprecht's application. *Jerome Thomas Lamprecht*, 99 FCC 2d 1229 (ALJ 1984).
- On December 11, 1984 the Review Board granted Marmet's application and denied Lamprecht's application. *Jerome Thomas Lamprecht*, 99 FCC 2d 1219 (Rev. Bd. 1984). On January 17, 1985 Lamprecht applied for Commission review of the Review Board Decision.
- On November 6, 1986 Marmet filed her "Motion For Decision Without Regard For Female Preference," wherein Marmet requested the Commission "to decide this case without regard for a female preference" and to immediately issue its decision in the Middletown proceeding.
- On November 18, 1986 Lamprecht filed his "Comments Of Jerome Thomas Lamprecht On 'Motion For Decision Without Regard For Female Preference'" and objected to Marmet's request as "unprecedented and inconsistent with the public interest." Comments at p. 2.
- On April 29, 1987 Marmet filed her "Motion For Decision On Review" and requested the Commission to expeditiously decide the Middletown proceeding. Lamprecht opposed that motion on May 8, 1987.
- On April 15, 1988 the full Commission unanimously affirmed the grant of Marmet's application and the denial of Lamprecht's application. *Jerome Thomas Lamprecht*, 3 FCC Rcd. 2527 (1988), *recon. den.*, FCC 88I-062 (released June 28, 1988).
- On June 1, 1988 Lamprecht appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit, but limited his appeal to the single issue of the constitutionality of gender enhancement. He sought and obtained repeated extensions, until October 5, 1990, to file his brief.
- On July 7, 1988 the Commission issued to Marmet an unconditional construction permit to operate on Channel 276A at Middletown, Maryland, and later that month assigned the call sign "WAFY(FM)".
- On July 21, 1989 Marmet filed with the FCC a Certification requested by the FCC staff that "she immediately will begin building the proposed facilities after the application [BMPH-890413TB] for modification of construction permit is granted."

- On May 7, 1990 Marmet commenced operation of WAFY(FM), Middletown, Maryland and Marmet has operated WAFY continuously since that date.
- On May 14, 1990 Marmet tendered an application for license to cover construction permit.
- On August 30, 1990 Marmet sent a letter to the FCC's Associate General Counsel stating that Lamprecht did not have a site for construction of the facilities proposed in his application.
- On September 19, 1990 Lamprecht admitted that he did not have a site and that he had concealed this fact starting October 2, 1982. Lamprecht refused to seek leave to amend his application, and he has not attempted to do so in the intervening eight years since September 19, 1990. Marmet therefore maintains that as a result of Lamprecht's actions and inactions this case ceased being a comparative one on October 2, 1982.
- On February 19, 1992 the United States Court of Appeals for the District of Columbia Circuit vacated the Commission's decision and directed the Commission to resolve the case without considering the gender of the applicants. *Jerome Thomas Lamprecht v. FCC*, 958 F. 2d 382 (DC Cir 1992).
- On April 24, 1992 Marmet filed "Comments" as to what further action should be taken by the FCC in light of the Court's February 19, 1992 remand. Marmet stated that if the Commission did not affirm the grant of her application without further proceedings or hearings, then she reserved the right to petition to add disqualifying issues against Lamprecht. April 24, 1992 "Comments," p. 8, n. 8.
- On September 18, 1992 the Commission disregarded the gender preference, granted Marmet's application and denied Lamprecht's application. *Jerome Thomas Lamprecht*, 7 FCC Rcd. 6794 (1992). Lamprecht again appealed to the United States Court of Appeals for the District of Columbia Circuit, *Jerome Thomas Lamprecht v. FCC* (Case No. 92-1586).
- On December 15, 1993 Marmet filed her "Brief of Intervenor Barbara D. Marmet" in Case No. 92-1586. Therein, Marmet advised the Court of Appeals that "Lamprecht does not have pending an application that the FCC can grant."
- On February 9, 1994 the Court of Appeals remanded the case to the FCC "for further consideration in light of this court's decision in *Bechtel v. FCC*, No. 92-1378 (December 17, 1993)."
- On December 20, 1994 the Commission granted Marmet's application for license (BLH-900514KB).

- On September 22, 1995 the Commission granted Marmet's application for renewal of the WAFY license (File No. BRH-950530UA)
- On December 4, 1995 the Commission granted Marmet's request to assign WAFY to Frederick Broadcasting LLC, a company which she controlled (File No. BALH-951120GE).
- On February 1, 1996 Marmet filed her "Motion to Dismiss Application of J. T. Lamprecht" ("Motion"), wherein Marmet requested that the Commission dismiss with prejudice Lamprecht's application because: (a) Lamprecht lacked a grantable technical proposal; (b) Lamprecht had violated Section 1.65 of the rules by failing to maintain the continuing accuracy and completeness of his application, and (c) Lamprecht had violated Section 73.3526 of the rules by failing to maintain a complete public inspection file for his application.
- On February 16, 1996 Lamprecht responded by filing "Jerome Thomas Lamprecht's Opposition to Marmet's Motion to Dismiss Application," as well as a "Motion for Rescission of License and Consent to Assignment."
- On February 28, 1996 Marmet responded to both filings with her "Reply to Opposition to Motion to Dismiss Application of J. T. Lamprecht" and her "Motion to Stay Consideration of Motion for Rescission of License and Consent to Assignment."
- On January 20, 1998 in the absence of any Commission action, Marmet tendered her "Request for Action on Motion to Dismiss Application of J. T. Lamprecht and Request to Terminate Proceeding." Attachment 3 therein is the Affidavit of James R. Remsburg. Mr. Remsburg states that Lamprecht did not call for closing under the March 10, 1982 Agreement and that the Agreement became null and void. Mr. Remsburg further states that as of October 2, 1982 there was no contractual obligation for the Remsburgs to sell the property to Lamprecht and that there was no land available to Lamprecht.
- On January 29, 1998 Lamprecht responded with two filings – his "Jerome Thomas Lamprecht's Opposition to Marmet's Request for Action on Motion to Dismiss Application" at the FCC and a "Petition for Writ of Mandamus Directed to the Federal Communications Commission" filed with the United States Court of Appeals for the District of Columbia Circuit in *Jerome Thomas Lamprecht*, Case No. 98-1052.
- On February 10, 1998 Marmet filed with the FCC her "Reply to Lamprecht's Opposition to Marmet's Request for Action on Motion to Dismiss Application of J. T. Lamprecht and Request to Terminate Proceeding."

- On March 19, 1998 Marmet supplemented her Reply with the "Request for Leave to File and Tender of Supplement to Marmet Reply," in which she provided a Letter Affidavit from retired Administrative Law Judge Walter C. Miller who had presided at the Middletown hearing. Judge Miller stated that, based upon his review of the record, Lamprecht was lacking in candor with and deceived the Judge, the Commission and the Court of Appeals with his "fictional application." Furthermore, Judge Miller states that "since Lamprecht has abused both the FCC's and the Court of Appeal's processes, his character qualifications are deficient."
- On March 26, 1998 the FCC filed with the Court of Appeals its "FCC Opposition to Petition for Writ of Mandamus," wherein the FCC advised the Court, at page 8, that "there [are] outstanding and unresolved questions as to Lamprecht's qualifications to receive a grant of his application."
- On March 31, 1998 Lamprecht filed with the FCC his "Jerome Thomas Lamprecht's Memorandum in Support of Marmet's Request for Leave to File and Tender of Supplement to Marmet Reply."
- On May 8, 1998 the Court of Appeals denied Lamprecht's petition for writ of mandamus, stating that Lamprecht "has not established that he is entitled to the grant of his application."
- On October 1, 1998 Marmet filed her "Renewed Motion To Dismiss Application Of J. Thomas Lamprecht And Waiver Request" ("Renewed Motion"), wherein Marmet asked the Commission: (a) to act on her February 1, 1996 Motion or (b) to waive the new rules and procedures adopted in the *Bidding Order* to the extent the Commission would postpone action on the Motion.

On September 8, 1982 Marmet filed her application for construction permit for Channel 276A at Middletown, Maryland. That was over sixteen (16) years ago. The Middletown, Maryland proceeding (MM Docket Nos. 83-985 and 83-987) is the oldest – by many years – initial licensing proceeding pending before the Commission.

Over eight (8) years ago, on August 30, 1990 Marmet first brought to the Commission's attention the fact that Lamprecht no longer had available to him the transmitter site proposed in his application and that he therefore lacked basic threshold qualifications. Moreover, on September 19, 1990 Lamprecht admitted that he had in fact

lost his transmitter site as of October 1, 1982. Therefore, for over sixteen (16) years, Lamprecht has failed to have pending before the Commission an application that could be granted. For the first eight of those sixteen years, Lamprecht concealed that fact from the Commission and the United States Court of Appeals for the District of Columbia Circuit. Lamprecht has steadfastly refused to attempt to take any action to try to cure this problem, and it is now too late to do so. *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (1970).

Since August 30, 1990 at all appropriate stages in this proceeding, Marmet has repeatedly urged the Commission to consider on the merits Lamprecht's September 19, 1990 admission that after October 1, 1982 Lamprecht no longer had a transmitter site, that he had concealed this fact from the Commission and that he lacked basic qualifications. Based on this, Marmet urged the Commission to dismiss Lamprecht's application.

The Commission did not act on Marmet's Motion to dismiss Lamprecht's application, even though it had the authority to do so and even though it issued two Public Notices stating its intention to resolve issues of basic qualifications.

In its February 24, 1994 Public Notice *FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (1994), the Commission stated that notwithstanding the freeze, it "will continue to issue decisions only in cases in which consideration of the applicants' comparative qualifications is unnecessary to resolve the case."

In its August 4, 1994 Public Notice *Modification of FCC Comparative Proceedings Freeze Policy*, 9 FCC Rcd 6689 (1994), the Commission affirmed "that during the freeze,

the Commission . . . will continue to issue decisions only in cases in which consideration of the applicant's comparative qualifications is unnecessary to resolve the case," adding that "parties to pending comparative proceedings should not file or respond to motions to enlarge the issues, except in those proceedings in which consideration of the applicants' comparative qualifications is unnecessary to resolve the case." The Commission added that "proceedings will not be bifurcated to adjudicate the basic qualifications of some of the applicants, where their disqualification would leave unresolved comparative issues involving other applicants." *Id.* at 6690. The latter statements clearly applied to the two-party Middletown, Maryland proceeding, wherein dismissal of the Lamprecht application for lack of basic qualifications would terminate the proceeding.

The Commission now seems to suggest that it will not consider Lamprecht's lack of qualifications until after an auction, *Bidding Order* at ¶¶ 90-91. This appears to be the case, despite the fact that if the Commission found Lamprecht unqualified and dismissed or denied his application, then there would be no auction, and the longest pending initial licensing proceeding could be terminated, consistent with the statutory mandate of Section 309(j)(6)(E) of the Communications Act of 1934, as amended, 47 USC §309(j)(6)(E).

That provision provides, as a mandatory rule of construction for competitive bidding, that:

Nothing in this subsection, or in the use of competitive bidding shall –

* * *

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.

In her October 1, 1998 Renewed Motion Marmet asked the Commission to act on her February 1, 1996 Motion, and, to the extent the Commission believes that its new

rules and procedures adopted in *Bidding Order* would permit postponement of action on the Motion, then Marmet further requested a waiver of those rules and procedures.

Marmet submitted a good cause showing in support, noting, among other reasons, that:

- A. The Middletown, Maryland proceeding is the oldest initial licensing proceeding pending before the Commission.
- B. Proceeding on the false assumption that Lamprecht was basically qualified, the Commission has twice adopted decisions on the merits granting Marmet's application and denying Lamprecht's application.
- C. The Middletown proceeding has been before the United States Court of Appeals for the District of Columbia on three separate occasions. Most recently, in its March 26, 1998 "FCC Opposition To Petition For Writ Of Mandamus" the FCC directed the Court's attention to the fact that "there [are] outstanding and unresolved questions as to Lamprecht's qualifications to receive a grant of his application." FCC Opposition, p. 8. In its May 8, 1998 Order, denying Lamprecht's petition for a writ of mandamus, the Court said that Lamprecht "has not established that he is entitled to the grant of his application."
- D. In both of its 1994 Public Notices the Commission stated its intention to address issues of basic qualifications where they would resolve the case. The Middletown proceeding involves only two parties. Dismissal of Lamprecht's application based on his admitted lack of basic qualifications would not require further hearings, would permit the Commission's grant of Marmet's application to become final and would permit the Commission to terminate the Middletown proceeding.
- E. WAFY(FM), 103.1 mHz, Middletown, Maryland has been on the air continuously since May 7, 1990. The Commission's stated reason for adopting the procedures in the *Bidding Order* – to expedite inauguration of new services – is irrelevant with regard to Channel 276A at Middletown because WAFY is on the air and has been serving the public for over eight years.

The Four-Part Test For A Stay Is Met

1. Likelihood of Success on the Merits

In her petition for reconsideration Marmet has alternatively demonstrated that (a) the Middletown proceeding should not be resolved by competitive bidding and (b) the basic qualifying issues in two-party proceedings such as the Middletown, Maryland proceeding should be resolved prior to auction. Furthermore, Marmet has pending before the Commission a request for waiver of the rules and procedures adopted in the *Bidding Order* to the extent the Commission would postpone until after an auction consideration of Lamprecht's basic threshold qualifications and action on Marmet's Motion to dismiss Lamprecht's application.

The Commission has the statutory authority to conduct a competitive bidding proceeding to resolve pending comparative licensing cases involving competing applications filed before July 1, 1997 under Section 309(l) of the Act. However, that authority exists in conjunction with the Congressional mandate set forth in Section 309(j)(6)(E) of the Act that "nothing . . . in the use of competitive bidding shall . . . be construed to relieve the Commission of the obligation in the public interest to continue to use . . . threshold qualifications . . . in order to avoid mutual exclusivity in application and licensing proceedings."

The Commission made no reference to Section 309(j)(6)(E) and cited only two reasons for deferring basic qualifying issues until after an auction: (a) "avoiding unnecessary litigation that would waste the resources of the private parties and of the Commission" and (b) postponing the auction "may substantially delay service to the

public.” *Bidding Order* at ¶ 90. Neither reason applies in the Middletown proceeding because: (a) the threshold qualifications issue is fully briefed, no hearing is required, resources have been spent and the issue is ripe for decision; and (b) WAFY has been on the air for more than eight (8) years, and the public is receiving service.

For the foregoing reasons, as well as for the reasons set forth in Marmet’s petition for reconsideration, her Motion and her Renewed Motion, Marmet submits that the Commission will conclude that: (a) Lamprecht lacks basic threshold qualifications and his application should be dismissed; (b) that the Motion should be acted upon under the procedures established in the two 1994 Public Notices; (c) that good cause exists to waive procedures established in the *Bidding Order* to act upon Marmet’s Motion prior to an auction; (d) that the Middletown proceeding should not be resolved by competitive bidding, and (e) that in the two-party Middletown proceeding – the oldest pending initial-licensing proceeding, in which basic threshold qualification issues have existed for more than 16 years, in which the facts have been admitted for more than 8 years, and in which WAFY has been on the air for more than 8 years – the public interest is served by postponing any auction until after final resolution of the issue surrounding Lamprecht’s basic threshold qualifications. When that issue is resolved, Marmet has demonstrated that the Middletown proceeding can be terminated, consistent with the Congressional mandate of Section 309(j)(6)(E).

Thus, Marmet has demonstrated her likelihood of success on the merits, including the ultimate merits – the dismissal of Lamprecht’s application for his admitted lack of basic qualifications.

2. Marmet Will Suffer Irreparable Harm

Marmet filed her application over 16 years ago. The Middletown proceeding was designated for hearing over 15 years ago. ALJ Walter Miller granted Marmet's application over 14 years ago. The FCC Review Board and the full Commission, twice, unanimously affirmed the grant of Marmet's application. The case has been before the US Court of Appeals three times. The FCC issued to Marmet and later modified the construction permit for Channel 276A at Middletown. The FCC required Marmet to certify that she would construct immediately the modified facilities. Marmet put WAFY on the air over eight years ago. The FCC has granted the applications for the WAFY license and for renewal of that license.

Shortly thereafter, Marmet brought to the Commission's attention Lamprecht's lack of basic qualifications. Since 1990, the FCC has taken no action despite the fact that Lamprecht has admitted his lack of basic qualifications and despite the fact that Lamprecht has taken every step possible to delay, postpone and avoid agency or judicial action. Marmet has spent hundreds of thousands of dollars and considerable personal time and effort pursuing the Middletown channel in reliance on rules and procedures in place in 1982 when she started and which she expected to remain in place. It is highly prejudicial to Marmet to expect her to go to auction and spend an uncertain amount of money to obtain finality of the grant already made by the Commission, especially when the Commission failed to follow the procedures set forth in its two 1994 Public Notices.

3. Lamprecht Will Suffer No Harm

Lamprecht has admitted his lack of basic qualifications. Lamprecht has steadfastly refused to take any actions to attempt to cure the defects, and it is now too late to do so. Other than gender enhancement Lamprecht has never contested the Commission's resolution of the comparative issues, and those findings and conclusions became final in 1988. Lamprecht has maintained a single legal theory -- he was a victim of unconstitutional discrimination and is entitled to a grant as a matter of right. While Marmet, the FCC and the Court of Appeals have rejected this theory, it is clear that granting a stay will do no harm to Lamprecht's theory and is, instead, fully compatible with his legal theory.

4. Public Interest

As already noted, WAFY has been on the air for more than eight (8) years. The FCC's concern for expediting inauguration of new service is therefore irrelevant because the service already exists. The public's greatest interest at this point is in obtaining a final resolution of Lamprecht's basic qualifications. Lamprecht concealed his lack of qualifications for over eight years and misled the FCC, the Court of Appeals and ultimately the public. For eight more years, after admitting his lack of qualifications, Lamprecht has taken every step possible to avoid a Commission decision. The public interest is not served by allowing this fraudulent behavior to continue and thus favors grant of a stay.

Accordingly, Marmet has conclusively demonstrated satisfaction of all four parts of the test to obtain a stay. Maintaining the *status quo* will permit consideration of the serious legal questions posed by Marmet without any harm to the public. By contrast denial of the stay will prejudice Marmet and perpetuate the harm to the public interest caused by

Lamprecht's abusive conduct and the Commission's failure to act previously on Marmet's Motion.

WHEREFORE, Marmet requests that the Commission stay the effectiveness of the *Bidding Order* as it pertains to the Middletown, Maryland proceeding until such time as the Commission grants her Motion or her companion Petition for Reconsideration.

Respectfully Submitted,

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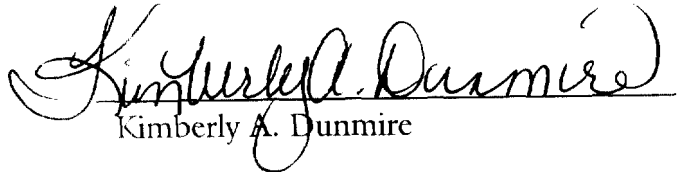
October 9, 1998

CERTIFICATE OF SERVICE

I, Kimberly A. Dunmire, do hereby certify that I have caused to be served by mail, First Class postage prepaid, this 9th day of October, copies of the foregoing "Motion for Stay" on the following persons:

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